

In Re: Uzi Einy. Case 2–AD–59

August 29, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On October 26, 2007, Administrative Law Judge Richard A. Scully issued the attached decision. He issued an erratum on October 31, 2007. The Respondent filed exceptions, a supporting brief, and an answering brief to the General Counsel's cross-exceptions. The General Counsel filed an answering brief, cross-exceptions, and a reply to the Respondent's answering brief on cross-exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Uzi Einy, is suspended from practicing before or appearing on behalf of a party before the Board for a period of 6 months from the entry of this Order.

Maria Balzano, Esq., for the General Counsel.
Uzi Einy, pro se, Respondent.¹

DECISION**STATEMENT OF THE CASE**

RICHARD A. SCULLY, Administrative Law Judge. On June 3–7, 2002, a hearing on Cases 2–CA–33940, 2–CA–34059, and 2–CA–34587 was held in New York, New York, before Administrative Law Judge Eleanor MacDonald of the National Labor Relations Board (the Board). Respondent, Uzi Einy, who had a substantial ownership interest in the affiliated business entities named as respondents in those cases, appeared at the hearing representing himself, Sharon Realty, LLC, Dan

Company, and Dan Company, LLC.² In her decision in those cases, which the Board has upheld, Judge MacDonald found that the Respondents are each single employers and together are joint employers and that they had committed certain unfair labor practices. The judge also recommended that the Board warn and reprimand Einy for his conduct during the hearing.

On August 26, 2005, the Board issued its decision in those cases, *675 West End Owners Corp.*, 345 NLRB 324 (2005). It upheld the judge's rulings, findings, and conclusions concerning the Respondents' employer status, the unfair labor practices, and that the Respondents' argument that the Board in its earlier representation case did not properly certify the Union was meritless. The Board also agreed with the judge's recommendation that the Respondents pay the litigation costs expended by the Union and the General Counsel as a result of Einy's willful violations of the judge's instructions regarding subpoenas. However, it declined to adopt the judge's recommendation that Einy be warned and reprimanded for his conduct during the hearing because it did not comport with Section 102.177(b) of the Board's Rules and Regulations and, instead, transmitted the recommendation to the investigating officer, the Associate General Counsel, Division of Operations-Management, pursuant to Section 102.177(e). Special Counsel Elizabeth Bach was designated to conduct the investigation of the misconduct allegations against Einy. By letter, dated January 25, 2006, Einy was notified of the misconduct allegations against him and given an opportunity to respond.

On October 25, 2006, a complaint and notice of right to hearing was issued by the Associate General Counsel. It alleges that the answer Einy filed to the complaint in Cases 2–CA–33940, 2–CA–34059, and 2–CA–34587, in which he had denied all of the allegations of the complaint, as well as receipt of the complaint, "was not filed in good faith and was interposed for the purpose of delay of the proceeding." It alleges that during the hearing before Judge MacDonald on June 3–7, 2002, Einy "disrupted and delayed the hearing by interrupting the judge, talking from the counsel table, and interfering with direct and cross-examination of witnesses with comments and interruptions." It also alleged that Einy's conduct failed to conform to the standards of ethical conduct required of practitioners appearing before the courts (which apply to persons appearing or practicing before Board), that he engaged in misconduct of an aggravated character, and that he should be suspended from appearing or practicing before the Board for a period of 2 years. Einy filed a timely answer in which he denied that he had engaged in any misconduct.

Pursuant to Respondent's request, a hearing in this matter was scheduled for April 26, 2007, in New York. However, during telephone conference calls I held with Respondent and counsel for the General Counsel, the parties agreed that they would waive a hearing and rely on the transcript and exhibits in the underlying unfair labor practices case as the record in this matter. Accordingly, by Order dated April 25, 2007, the hearing was canceled and the parties were given until May 15, 2007, to designate the portions of the transcript and the exhibits

¹ Some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

² Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

¹ Erin Costello of New York, New York, who had not previously participated in this matter, filed a brief on behalf of Respondent.

² During the course of the hearing, Einy also stated that he was representing Shlomo Einy.

on which they would rely. Counsel for the General Counsel had already made designations in a letter to Respondent, dated April 20, 2007 (GC Exh. 2), and subsequently identified General Counsel Exhibits 7(a)—(d), which had been admitted in the underlying proceeding. Respondent has not objected to admission of the formal papers (GC Exh. 1) or the General Counsel's other exhibits (GC Exhs. 2—7) and they are admitted to the record.

Respondent has designated the entire transcript and a number of exhibits from the underlying proceeding, as well as documents from other representation and unfair labor practice cases. Counsel for the General Counsel has filed a motion to exclude certain of those exhibits as not relevant, to which Respondent has filed a response. I find that counsel for the General Counsel did not waive her right to object to these exhibits on the grounds of relevance, as Respondent contends. I grant the motion and deny admission of Respondent Exhibits 29, 31, 32, 35, 39, 42, 43, 44, 45, 46, 47, and 49 which were not admitted in the underlying proceeding, and Respondent Exhibits 6, which is a letter relating to a representation matter, 11, 65, 68, and 69—74, which are transcript excerpts and exhibits from hearings other than the underlying proceeding. These exhibits are denied admission as not relevant to any issue in this proceeding.

Respondent also seeks to have admitted to the record copies of letters exchanged between himself and Special Counsel Bach, dated October 3 and November 13, 2006, respectively, which are identified as Respondent Exhibits 75(a) and (b). Counsel for the General Counsel objects to their admission on the grounds that they are part of correspondence dealing exclusively with settlement discussions, that they are inadmissible under Rule 408 of the Federal Rules of Evidence, and that they are not otherwise relevant. Respondent contends they are admissible under FRE 408 and 106. Both of the letters relate solely to Respondent's "questions regarding the settlement." FRE 408 states in relevant part, "evidence of conduct or statements made in compromise negotiations is likewise not admissible." The letters do not come within any exception to the prohibition contained in the rule. The letters are not admissible under FRE 106 which deals with admission of the remainder of or related writings or recorded statements. Counsel for the General Counsel's objection to admission of Respondent Exhibits 75(a) and (b) is sustained. Respondent's other exhibits are admitted to the record.

I have given the briefs submitted on behalf of the parties due consideration. Significant portions of Respondent's brief are devoted to an attempt to relitigate procedural and evidentiary issues arising in the underlying proceeding and to accusations of bias and misconduct on the part of the administrative law judge during the hearing. The Board has already ruled on the exceptions filed by Einy and the other Respondents in its decision in *675 West End Owners Corp.*, supra, which cannot be collaterally attacked here. The Board also considered Respondents' contentions that the judge's rulings, findings, and conclusions demonstrated bias and prejudice, that they were not afforded a full opportunity to be heard, and that the judge should have recused herself, and found them without merit. I have given those portions of the brief no consideration except insofar as they assert that Einy's conduct at the hearing was in

reaction to or caused by rulings or comments by the judge. On the entire record, I make the following

FINDINGS OF FACT

A. Respondent's Answers in the Underlying Proceeding

The first issue raised in the complaint in this proceeding is whether the answers filed by Einy to the complaint and amended complaint in the underlying proceeding were filed in good faith and not interposed for the purpose of delay.

A consolidated complaint was issued in Cases 2—CA—33940 and 2—CA—34059 and served on the named Respondents on April 17, 2002.³ On May 17, Region 2 received an answer to the complaint in the form of a letter, dated April 25, signed by Einy, in which he stated that he was out of the country, denied that he had received or seen the complaint, and denied "all of the allegations in the charges and in the complaint." A cover memorandum, dated May 16, stated that Einy had mailed the letter to Region 2 and other parties from St. Maarten, N.A. on April 26. By letter, dated and faxed to Einy on May 31, counsel for the General Counsel Judith M. Anderson informed Respondents that she intended to amend the complaint at the hearing by consolidating those cases with Cases 2—CA—34587 and adding an additional allegation. At the opening of the hearing on June 3, Einy submitted an amended answer to the amended complaint in which he denied being served with the amended complaint or having seen it and denied "all allegations in the charges and in the complaint."

Einy appeared at the hearing in *675 West End Owners Corp.*, supra, on June 3—7 and represented himself, as a named respondent, as well as the Respondents listed above.⁴ At the hearing, Einy made motions, offered exhibits into evidence, called and examined witnesses, cross-examined the General Counsel's witnesses, conducted voir dire, raised objections, and made arguments to the judge on behalf of Respondents. In her decision, Judge MacDonald stated that "it was clear that Uzi Einy spoke for all of the entities and that he made the decisions concerning the conduct of the instant case." (JD, p. 9)

Section 102.20 of the Board's Rules and Regulations requires that a respondent in an unfair labor practice proceeding file an answer to the complaint within 14 days of the date of service. In that answer, "the respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial." Section 102.22 authorizes the Regional Director filing the complaint to extend the time within which the answer must be filed upon a showing of proper cause. Section 102.23 permits a respondent to amend his answer at any time prior to the hearing and, thereafter, upon motion granted by the administrative law judge or the Board.

Einy did not file a motion requesting that the Regional Director extend the Respondents' time to answer the complaint in the underlying cases. As noted, his answers to the complaint

³ All dates are in 2002 unless otherwise indicated.

⁴ In a prior representation proceeding involving these Respondents, Case 2—RC—22120, Einy entered an appearance on behalf of himself, Sharon Realty, and Dan Company, LLC.

and the amended complaint denied all of the allegations. Many of the allegations concerned facts that had already been stipulated by him or litigated and resolved against him in other cases in which he had participated and others involved service of documents, some of which he had previously acknowledged receiving. This necessitated that counsel for the General Counsel present evidence to establish these allegations and service of documents at the hearing. The complaint allegations included: the affiliation of the various entities named as respondents as a single-integrated business enterprise and single employer, the ownership of various buildings, the amount of gross revenues received by them annually, their status as an employer engaged in commerce within the meaning of the Act, the appropriate bargaining unit, the conduct of an election and Board certification of Stationary Engineers, Firemen, Maintenance and Building Service Union, Local 670, as the exclusive collective-bargaining representative of the unit, and the agency and supervisory status of Einy and others. See the judge's decision in an unfair labor practices case, *675 West End Owners Corp.*, supra, and the various decisions, orders, and the certification of representative in *675 West End Owners Corp.*, supra, Case 2-RC-22120. The letters that Einy sent to Region 2 on August 29, September 25, October 26, and November 8, 2001 (GC Exhs. 7(a)-(d)), responding to charges in the underlying Cases (2-CA-33940 and 2-CA-34059), establish that he had in fact been served with copies of those charges.

In this matter, Respondent continues to assert that he was not served with the complaint in the underlying cases and that he submitted a general denial to avoid being in default. In her decision, Judge MacDonald found that the Respondents had a practice of refusing to claim certified mail deliveries of documents from the Board's Regional Office, including those addressed to 700 West End Avenue, which Einy acknowledged was a correct address. I accept as true Einy's assertion that he was out of the country when the complaint in the underlying proceeding was issued and served, and that he had not seen it when he filed his answer, dated April 25, in which he denied all of the allegations. However, this also establishes that he had knowledge of the existence of the complaint for nearly 6 weeks prior to the commencement of the hearing on June 3. Under the Board's Rules, it was incumbent upon Einy to ascertain what was being alleged in the complaint and to make a good-faith effort to respond to it.⁵ However, he failed to take any action to amend his answer to admit the allegations referred to above which had been established in the earlier proceedings in which

⁵ Sec. 102.21 of the Board's Rules and Regulations provides in pertinent part: "An answer of a party represented by counsel or non-attorney representative shall be signed by at least one such attorney or non-attorney representative of record in his/her individual name, whose address shall be stated. . . . The signature of the attorney or non-attorney party representative constitutes a certificate by him/her that he/she has read the answer; that to the best of his/her belief there is good ground to support it; and that it is not interposed for delay. . . . For a willful violation of this section an attorney or non-attorney party representative may be subjected to appropriate disciplinary action." [Emphasis added.]

he had admittedly participated.⁶ When counsel for the General Counsel amended the complaint at the commencement of the hearing on June 3, Einy amended his answer only to the extent that he denied all of the new allegations of the amended complaint. During the hearing, Judge MacDonald pointed out to Einy that his blanket denial of all of the complaint allegations included matters which had already been decided and cautioned him to reconsider his position but he failed to do so. On the last day of the hearing, after a significant amount of time had already been spent establishing it, Einy suggested that he might be willing to stipulate to the facts establishing the Board's jurisdiction, but only for that case.

I find that counsel for the General Counsel has established that Einy willfully submitted answers in the underlying cases in which he refused to admit factual allegations that he knew had previously been established in previous Board proceedings in which he had participated. She has also established that Einy falsely represented that he had not been properly served with the complaints and other documents relating to those cases. I find that Einy has failed to establish that he had any reasonable basis for denying those factual allegations or that proper service had been effected. As a result, counsel for the General Counsel had to present evidence to prove those factual allegations and to establish that effective service had been made upon the Respondents. This unduly prolonged the hearing and wasted the time and resources of the Board and the Charging Party. The Board has expressed strong disapproval of such conduct. E.g., *Nursing Center at Vineland*, 318 NLRB 337, 338 fn. 7 (1995); *Graham-Windham Services*, 312 NLRB 1199 fn. 2 (1993).

B. Einy's Conduct During the Hearing

The complaint also alleges that during the hearing in the underlying proceeding Einy "disrupted and delayed the hearing by interrupting the judge, talking from the counsel table, and interfering with direct and cross-examination of witnesses with comments and interruptions." Prior to the scheduled hearing in this matter, counsel for the General Counsel provided a list of pages of the transcript in the underlying proceeding in which the alleged misconduct occurred. She asserts that the following constitute instances of misconduct:

At page 23, Administrative Law Judge has to instruct Einy to be quiet. The transcript fails to establish this. Einy stated that his English was not good and requested that a translator be provided. The judge denied his request. The transcript shows that the judge later interjected the word "quiet" into a statement she was making about an exhibit. It is not clear to whom, if anyone, the judge was speaking.

At pages 51-53, Einy interrupts the Administrative Law Judge. The transcript shows that counsel for the General Counsel was introducing an exhibit to establish that the Respondents were a single, integrated business enterprise, one of the allegations that had been established in a

⁶ In his brief, Respondent suggests that the Region or the General Counsel should have put him on notice that the answer he filed was unsatisfactory. Given his practice of failing to accept deliveries of mail from the Region, the futility of such an effort is readily apparent.

previous Board proceeding but denied by Einy in his answer. As counsel attempted to do this, Einy interjected objections and argument, often interrupting counsel and the judge. I find this conduct was discourteous showed a disregard for courtroom decorum expected of practitioners before the Board.

At page 81, counsel for General Counsel notes that Einy has been trying to talk with one of her witnesses and that Einy repeatedly continues to talk after the judge told him he cannot. The transcript shows that counsel for the General Counsel stated that Einy had attempted to talk to one of her witnesses between sessions and that she did not want him to do so. Einy asked to respond and the judge denied him permission, stating, “this has nothing to do with you.” Einy responded that it did involve him and that it was improper for counsel to not let him talk to the witness. From all that appears, counsel for the General Counsel was not complaining about Einy’s contact with the witness, which she stated “was not the problem.” The problem was that the witness wanted to leave, that counsel did not want to call him at that time, and that she wanted the judge to instruct the witness that he had to stay or return the following day. I find no misconduct on the part of Einy here.

At page 119, Administrative Law Judge refers to interruptions by Einy, he continues to interrupt General Counsel’s examination, and Administrative Law Judge tells Einy to stop interfering. The transcript shows (p. 113) that the judge noted on the record that, after a 5-minute break, Einy failed to return to the courtroom and that no one at the Respondent’s counsel table knew where he was. After waiting at least 5 more minutes, the judge resumed the hearing without him. The transcript (p. 118) shows that Einy raised an objection to a question to a witness by counsel the General Counsel because he did not know the time period involved. The judge informed Einy if he had not returned 15 minutes late from a 5-minute break he would have heard the time period stated in the question and told him to listen carefully. The judge also told Einy that returning late would not be tolerated and that he should be on time and listen. Einy responded, “I have other matters, you know Your Honor.” The next question directed the witness’s attention to “a couple of months after you started working.” At page 119, Einy interrupted while it was being translated by an interpreter to object that he “wanted to know for what period.” The judge pointed out that the time was stated in the question and that he should “be quiet and listen.” After a question as to whether the witness had “ever” had a conversation with a named individual was answered by the witness, Einy again objected that he wanted to know “for what period.” The judge cautioned Einy to stop interfering with the testimony. I find that, under the circumstances, Einy’s objections were baseless, that his conduct was disruptive, and that it showed a complete disregard for courtroom decorum expected of practitioners before the Board, not to mention common courtesy.

At pages 121–123, Einy interrupts General Counsel’s examination, ALJ tells him to stop interfering. The transcript shows that an employee witness was being asked to testify about a conversation he had with Einy which apparently had been recorded. Einy’s objection was based on his contention that the conversation was “not exactly what he is saying here.” When the judge overruled his objection as improper, Einy argued that he believed it was a proper objection. When counsel questioned asked the witness about another conversation with a named individual, Einy interjected that he wanted “to know for what purpose she is asking these questions.” When the judge told him that counsel was not required to give him an explanation, Einy argued that the conversation had nothing to do with the case. When the judge told him she had found the question was not objectionable, Einy responded rhetorically, “And if I ask on my turn she will not stop me and cancel me, and you will not sustain.” Einy contends he had a right to raise his objections, that the judge prevented him from stating the basis for the objections, and that the judge thwarted his attempt to make his defense. I find that the record shows that the basis for the objections was that Einy, who was a party to the conversation in question, disputed what the witness was saying as not exactly what Einy remembered it to be. As the judge noted, that was not a proper basis for an objection. This involved the presentation of the General Counsel’s case, not the Respondents’ defense. Einy was attempting to interfere with the presentation of the witness’s testimony by providing his own version of the conversation. I find that Einy’s objections were improper and his comment to the effect that the judge would rule differently if counsel for the General Counsel raised objections was inappropriate and insulting.

At pages 130–132, Einy interrupts GC’s examination, ALJ tells him to wait and listen, Einy continues to ask questions, ALJ tells him he is not listening and she can hear him talking during the questions. During the witness’s testimony about a conversation with Einy, Einy interrupted with a question that was answered by an attorney for the Respondents. When counsel for the General Counsel objected to Einy’s interruptions, he responded that he does not hear well. The judge stated for the record that he was not listening to the questions as she could hear him talking while the questions are being asked. Einy continued to assert that he could not hear and the judge cautioned him to stop talking and listen. Einy contends that he asked to have the witness’s answer repeated because he did not hear it. However, the judge who was observing him noted for the record that he was busy talking and not listening to the testimony. I find that the transcript shows Einy’s lack of courtroom decorum and his propensity to speak out whenever he felt like it regardless of the fact that it was disruptive and the result of his lack of attention to the proceedings.

At page 140, Einy interrupts General Counsel’s examination to ask what the witness said, Administrative Law Judge tells him that he was talking during the ques-

tioning and tells him to pay attention. Einy argues with the ALJ and continues to ask questions. During testimony by the witness about a matter he had previously testified took place “towards the end of September or the beginning of October,” counsel asked where it had taken place. Einy interrupted to ask that he be given the date. The judge told him he had been talking when the date was mentioned and that he had to pay attention. Einy denied that he had been talking responded, “She said after September. When? Between September and October That is what I have. I want to know.” Einy contends that there was a recess of the hearing between when the date was mentioned and when he asked for clarification of the date. I find that the transcript shows Einy’s lack of courtroom decorum and his propensity to speak out whenever he felt like it regardless of the fact that it was disruptive and the result of his lack of attention to the proceedings.

At pages 143–144, Einy interrupts GC’s examination asking for specific information in CG’s questions. Administrative Law Judge tells Einy he has to stop doing that. Counsel for the General Counsel asked the witness if he had a conversation with Einy. Einy interjected, “When. I’d really like to know,” and asked for the year and month. The judge told him to stop interrupting counsel’s questioning. Einy contends that this did not constitute misconduct because he was asking for a time frame. I find that the transcript shows that Einy made an inappropriate interruption of counsel for the General Counsel’s questioning of the witness. He may well have had a legitimate objection, if the witness had begun to describe the conversation without a proper foundation as to the time (and location), but his interjection demanding that information was premature, as counsel’s next question demonstrated, and was disruptive. Counsel was entitled to present her evidence in the manner she chose, free from Einy’s continued interruptions.

At page 147, Einy interrupts and Administrative Law Judge tells him his comments are not helpful and to listen to the testimony. The witness testified that he got full-time work “in November or 2000.” Einy interjected, “Your Honor, we jumped from 1999 to 2000. I just want to know. We were talking about 1999.” The judge told him his comments were “not helpful.” Einy contends that he was asking for clarification because the witness skipped from October 1999 to November 2000. I find the interjection was inappropriate. It was not stated as an objection or request for clarification, but as a challenge to the witness.

At pages 185–187, Einy interrupts Administrative Law Judge. Continues talking after Administrative Law Judge tells him “that’s enough.” Administrative Law Judge admonishes him for not following her instructions. Administrative Law Judge again notes that Einy is talking in background or while others are talking, and describes his conduct as “misbehavior.” After counsel for the General Counsel made a statement concerning her belief that sanctions should be instituted against Einy for his conduct in his dealings with the Board, Einy asked to respond and al-

though the transcript is not clear apparently stated that the Region used witnesses who “lie.” The judge told Einy “that’s enough” but he continued to talk. The judge told Einy that if he did not follow her instructions she would eject him from the courtroom and told him to “behave according to the rules.” The judge also cautioned Einy that she did not want any talking in the background as it was distracting. At that point, new additional representatives made appearances on behalf of the Respondents during which Einy, according to the judge, talked so loud that it was difficult to hear what other people were saying. Einy responded that he was talking “very quietly.” The judge told Einy that she could hear him talking and that it was misbehavior. Einy contends his talking involved an attempt to clarify which parties were represented by the new individuals. I have no reason to doubt that, as noted for the record by the judge, Einy continued to ignore the judge’s instructions about not disrupting the proceedings by talking in a loud and distractive manner. This demonstrated a lack of courtroom decorum which disrupted and delayed the proceedings.

At page 211, Einy interrupts the General Counsel to make argument during cross-examination. He’s told by the Administrative Law Judge that he cannot do it. Continues to argue. While cross-examining a witness, Einy said that he wanted to read a portion of a transcript that was in evidence in order to “clarify that line.” The judge told him it was the time to cross-examine the witness and that if he wanted to argue about the transcript to do it in his brief. I find no evidence of misconduct here.

At page 222, Einy interrupts General Counsel’s voir dire and tries to testify for a witness. Einy showed the witness he was cross-examining an employment application form and asked him if had been asked to fill it out. The witness answered that he had been asked by Einy to fill out the form more than once but had not done so. On voir dire, counsel for the General Counsel asked the witness when he was given the form. Before he could answer, Einy interjected, “But I ask him March and he say yes.” The transcript shows that the witness did not say that the form was given to him in March. I find that Einy improperly interrupted the questioning of a witness by counsel for the General Counsel but it does not appear that he was trying to testify for the witness.

At pages 251, 252, 259–261, 271, Einy argues with Administrative Law Judge. I find no evidence of any argument or misconduct on page 251. On page 252, during cross-examination of a General Counsel witness, Einy asked a question that obviously sought an inadmissible hearsay answer. The judge told him she would not allow the question. Einy stated, “I mean you let—when she asked on direct to answer what he is saying, why don’t you—.” The judge had already made her ruling. Einy’s subsequent comment implying that the judge was treating the parties differently was inappropriate and insulting. At pages 259–261, Einy attempted to introduce an exhibit into evidence. The judge sustained counsel for the Gen-

eral Counsel's objection on the grounds that the exhibit was not a complete document. Einy repeatedly argued that the document should be admitted notwithstanding the judge's ruling. At one point he told the judge, "But I want to put on the record—and I don't want you to stop me from putting on the record that on that document there is a certain thing that he testified about." In his brief, Einy contends that he was simply asking that the exhibit be put in the rejected exhibit file. I find unpersuasive this after-the-fact attempt to revise his comments. I find his conduct demonstrated a lack of courtroom decorum and disrupted and delayed the hearing.

At pages 349–352, Einy arrives late, interrupts cross-examination. Administrative Law Judge says *there is too much noise from the counsel table and she cannot hear questions and answers. Administrative Law Judge tells Einy to listen to the witness and notes that Einy is not paying attention and does not know what is going on. Administrative Law Judge tells Einy to stop talking and pay attention. Einy appears not to pay attention and asks "what happened?"* Counsel for the General Counsel complained about talking at the counsel table but it is not clear who was involved. Einy who had arrived in the courtroom late interjected a request for a document being discussed by the witness and the judge noted that Einy already had it. After counsel asked a witness about a letter he received but before it was identified, Einy interjected that he wanted to know the exact date. As counsel asked the witness to identify the exhibit, the judge noted that there was too much noise at the counsel table and she could not hear the witness. Einy responded that he just wanted to know what happened. The judge told him he should have been there on time and that he better listen to the witness. Einy responded, "I came yesterday, I can't come everyday and I just wanted to find out what happened here." The judge again told him to listen, to stop talking, and pay attention. As counsel asked additional questions, Einy interjected an inquiry as to whether an exhibit had been admitted and was told by the judge that it had not been offered. I find that the transcript shows that Einy arrived late for the hearing and disrupted and delayed the hearing as he attempted to find out what occurred while he was not there as well as things that happened after he arrived but to which he was not paying attention. He also implied that, although he represented some of the parties, he could not be at the hearing all the time. Einy contends that last part of the cited transcript lines somehow shows that the judge "taunted Einy for his inability to hear and understand English. On the contrary, it shows that despite the disruption and delay previously caused by Einy inattention, the judge went out of her way to repeat the testimony which Einy claimed he had not heard

At page 363, Administrative Law Judge notes that Einy is not paying attention and is talking over the judge as she gave counsel instructions. After counsel for the General Counsel asked a leading question, the judge cautioned her and she withdrew the question. At that point,

Einy interjected, "Asked and answered." The judge pointed out to him that she had already ruled on the question and that he had not been paying attention. Einy responded that he did not hear well and the judge noted, "No, you were talking over me while I was giving counsel an instruction. Don't talk while I am talking." Einy contends he was making a permissible objection. I find that the transcript shows that Einy interrupted and delayed the hearing by raising an objection that had already been disposed of by the judge because of his failure to pay attention to what was going on.

At pages 373–375, Einy interrupts the Administrative Law Judge after being told his question is inappropriate. Einy says "I want to ask him" and continues to ask after repeatedly being told he cannot. After the judge explained to Einy that his question was inappropriate because the bargaining unit had already been certified and that on cross-examination his questions are limited to areas covered by the direct testimony of the witness. Einy asked additional questions relating to the representation case and the judge cautioned him that the subject was not appropriate and that other questions misstated the direct testimony of the witness. The transcript shows that after being told that his questions were not pertinent or did not relate to direct testimony Einy ignored the judge's ruling persisted in asking such questions, because "I want to ask him [these questions]." I find his conduct demonstrated a lack of courtroom decorum and disrupted and delayed the hearing.

At page 416, Administrative Law Judge admonishes Einy to stop talking. While on the witness stand Einy apparently asked, through the interpreter, that he be given a copy of an exhibit that was being distributed by counsel for the General Counsel. The judge told Einy to stop talking. I find that the transcript shows no misconduct here.

At page 432, Einy appears to not be paying attention. The Administrative Law Judge admonishes him for not listening. Counsel for the General Counsel discussed some housekeeping details about some hearing transcripts from prior cases that were in the courtroom. Einy said that he might want to refer to the transcripts in cross-examining witnesses. The judge told him that if he had been listening he would know that they would be available. I find no misconduct involved here.

At pages 455–456, Einy disregards the judge's instructions not to continue. He responds "I want to continue and continues after the judge again tells him he can't. Administrative Law Judge noted that Einy doesn't listen, doesn't pay attention. While Einy was cross-examining a witness, counsel for the General Counsel objected to a question and the judge overruled the objection. Before the witness could answer, Einy began asking a new question. The judge cautioned him not to do that and the question had to be repeated because the witness did not remember it. The judge noted that Einy lost the question and answer because he was not paying attention. I find that Einy's lack of attention resulted in a minor delay of the hearing.

At pages 472–473, Administrative Law Judge tells Einy that he may want to reconsider his position and admit some portions of the complaint not in dispute. She admonishes him to stop his attempts to delay the hearing. This does not involve conduct by Einy apart from what the judge discusses in her comments.

At page 506, Einy has two cell phones on and a phone continues to ring causing disruption. Einy's cell phone rings two separate times while the hearing is on the record. Einy contends that it is a frivolous allegation because "he is not the first one to forget to turn a cell phone off in a courtroom." While I don't doubt that there was nothing malicious in Einy's failure to shut off his cell phones and that it was not intended to interrupt the hearing, this incident is further evidence of the inattention and lack of courtroom decorum that Einy demonstrated throughout the hearing.

At page 529, Einy wants the General Counsel to explain why she is calling a witness. Administrative Law Judge warns him he is not following procedure. Warns him again about not following her instructions and interfering with General Counsel's presentation of her case. Einy interrupts the General Counsel's examination of a witness to ask why she is calling him. The judge tells him counsel does not have to tell him and directs him to follow her instructions and to not interfere with the presentation of the General Counsel's case. I find the transcript shows that Einy interrupted the proceedings to request an explanation of why a witness had been called, something he was previously told by the judge he could not do, causing a brief delay.

At pages 533–535, Einy is told to be quiet. Administrative Law Judge tells him he cannot talk so loud she cannot hear. Einy continues to talk to the witness in a different language. The judge tells him he cannot communicate with a witness on the stand testifying and characterizes it as "misbehavior." Einy continues conferring at counsel table and is told again to be quiet. During questioning by counsel for the General Counsel of an associate of Einy, at the counsel table, Einy spoke so loudly that it is noted on the transcript. The judge told Einy to be quiet as he was so loud she could not hear what was going on. Counsel for the General Counsel pointed out that Einy was speaking to the witness on the witness stand. The judge told Einy such communication was misbehavior and could lead to his exclusion from the hearing room. As counsel continued her examination, the judge told Einy to be quiet and he responded that he was speaking to someone at the counsel table. I find the transcript shows that Einy disrupted and delayed the hearing by attempting to communicate with a witness on the witness stand and by talking so loudly during the hearing that the judge had to admonish him to be quiet.

At page 539, Administrative Law Judge repeatedly tells Einy he cannot speak at that time and he continues to speak. Administrative Law Judge tells him to be quiet and

let the questioning continue and that Einy is interfering with General Counsel's examination of the witness by cutting her off. During a discussion concerning what the judge characterized as improper objections by Einy, she told him to sit and be quiet unless he had a proper objection. Einy continued to argue with the judge. The transcript shows that Einy raised an objection when no question was pending and that the judge told Einy that she had repeatedly warned him that he had to stop interfering with the presentation of testimony with improper objections. I find the transcript shows that Einy's refusal to obey the judge's instructions and continued arguing after she had ruled demonstrated a lack of courtroom decorum and disrupted and delayed the hearing.

At pages 551–552, interrupts and argues with the Administrative Law Judge. Continues talking after being told to be quiet. Einy raised an objection to a question to a witness by the counsel for the General Counsel. The judge explained that permission to do so had been given pursuant to the Federal Rules of Evidence (FRE 611(c)). Einy continued speaking and arguing with the judge after she had ruled and complained that she had not explained this to him and he was not a lawyer. When the judge told him she did not have to explain the law to him. Einy told her "you need to explain." I find the transcript shows that Einy's inappropriate questioning of the judge about her rulings and his continued arguing after she had ruled demonstrated a lack of courtroom decorum and disrupted and delayed the hearing.

At page 561, Einy's conferring during General Counsel's examination of a witness. The transcript at page 561, line 15–16, indicates: "(Mr. Einy conferring) (Pause)." There is no indication that this involved any disruption or delay of the hearing.

At pages 568–569, Einy conferring during General Counsel's examination and then complains that he cannot hear. Administrative Law Judge notes that it is because he was busy talking and she heard conversation from counsel table. The transcript indicates that Einy is conferring at the counsel table loud enough to be heard. Einy complains that he cannot hear what counsel for the General Counsel is saying and asks to have it repeated. The judge notes that he was talking and that she could hear Einy talking. Einy contends that it is not unusual for there to be noise when so many representatives are conferring. I find the transcript shows that Einy's loud talking at the counsel table while counsel for the General Counsel was examining a witness demonstrated a lack of courtroom decorum and disrupted and delayed the hearing.

At pages 579–580, Einy makes a speech and is told he cannot do so at that time. Administrative Law Judge tells him to be quiet, listen to her ruling, and do not disturb the proceedings. After counsel for the General Counsel offered an exhibit, Einy objected and stated his reasons. Counsel for the General Counsel responded and the judge

denied Einy's request to argue further and sustained his objection. I find no misconduct here.

At pages 586–587, Administrative Law Judge tells Einy to wait but he continues talking. Counsel for the General Counsel raised a question about upon whom service should be made in the case. Einy asked to respond and the judge told him to wait. Einy continued to speak expressing his desire to be heard before the judge ruled and continued to talk after she again told him to wait. The judge decided to take up the matter at some other time. I find the transcript shows another example of Einy's lack of courtroom decorum and repeated failure to listen to the judge and follow her instructions.

At page 600, Administrative Law Judge notes that Einy is gesturing to the witness to show him what he wants to testify. Counsel for the General Counsel objected to Einy's leading question during direct examination of his own witness. The judge sustained the objection and also noted on the record that Einy was gesturing to the witness to show him what he wanted the witness to testify. Einy denied this and the judge stated, "I was watching you gesture to him." Einy contends that he gestures a lot when he talks and that he was gesturing because he was asking about a part on a fax machine and he did not know what the part was called. I find the transcript fails to establish misconduct here. Neither the judge nor counsel for the General Counsel seemed to feel the gesture was significant and there is no evidence Einy made any more such gestures after being cautioned by the judge.

At pages 622–624, Einy states that he is talking on behalf of Shlomo Einy. This does not appear to involve an allegation of misconduct but is evidence that Einy acted as a representative of parties other than himself during the hearing.

At page 647, Einy continues talking while Administrative Law Judge is giving information about the use of prior transcripts. The judge asks if he wants to hear, or to talk. Einy attempted to put into evidence the transcript of a prior Board proceeding. As the judge described what he had to do to get relevant portions into the record, Einy twice interrupted her. I find this again demonstrated Einy's lack of courtroom decorum.

At page 694, Einy asks to have an exhibit marked but is not letting reporter mark it. The judge tells him he has to stop talking and listen to what is happening. I find it difficult to understand what was happening but it does not appear to constitute misconduct on Einy's part.

At page 735, Einy tries to answer when the judge is questioning the witness. The judge asked the witness to clarify something in his testimony. Before the witness could respond, Einy interrupted, accused the judge of trying to confuse the witness, and said that he had already answered the question. The judge clearly had the right and obligation to ask questions she felt necessary to clarify the testimony of the witness. It was entirely inappropriate for

Einy to attempt to interfere and to suggest an answer to the witness. I find the transcript establishes gross misconduct on the part of Einy here.

At pages 744–745, Einy continues to question the witness regarding subjects the judge had repeatedly told him he could not ask about. Einy asked the witness a question about a matter involved in a prior unfair labor practice case and the judge sustained the objection raised by counsel for the General Counsel. I find no misconduct here.

At pages 813–814, Einy interrupts questioning by GC. Testifies for the witness and twice asks questions during GC's cross-examination. Tries to clarify the witness' testimony. During cross-examination by counsel for the General Counsel, Einy interrupted her questioning with an argumentative remark, he attempted to change one of her questions, and he interrupted the witness's answer. I find the transcript demonstrates Einy's lack of courtroom decorum and that his conduct disrupted the hearing.

At page 824, the judge tells Einy to be quiet during GC's objection. She notes that she cannot hear because people are talking during the witness's testimony. Counsel for the General Counsel objected that a question was beyond her redirect and Einy responded that the witness had testified to it. The judge stated that while the witness was testifying and people were talking, she could not hear. I find no misconduct by Einy here.

At pages 842–845, Einy testifies about the circumstances surrounding his answer to the complaint and amendment to the complaint. States for the first time that he is ready to stipulate to jurisdiction. This does not appear to involve an allegation of misconduct at the hearing but bears on the allegations that Einy acted in bad faith in submitting his answers.

At page 857, Einy gives hand signals to the person questioning him. Counsel for the General Counsel stated that she wanted the record to reflect that Einy was giving hand signals to the person questioning him. The judge did not comment or indicate that this in fact had occurred. I find no misconduct here.

At pages 878–879, Einy testifies about his receipt of the complaint and his answer to the complaint. This does not appear to involve an allegation of misconduct at the hearing but bears on the allegations that Einy acted in bad faith in submitting his answers.

At pages 886–887, Einy interrupts the Administrative Law Judge and ignores her instructions to wait. As the judge discussed the date for post-hearing briefs, Einy interrupted her to ask if he could make a closing statement. The judge told him to "wait" and he interrupted her again to ask about a stipulation. He interrupted her two more times despite her instructions that he "wait." I find the transcript demonstrates Einy's lack of courtroom decorum and that his conduct disrupted the hearing.

At page 893, Einy admits jurisdiction. This does not appear to involve an allegation of misconduct at the hearing but bears on the allegations that Einy acted in bad faith in submitting his answers.

Based on the foregoing, I find that throughout the hearing in the underlying cases Einy repeatedly acted in an unprofessional manner which disrupted and delayed the proceedings and wasted the time and resources of the Board. While some of the earlier instances of Einy's misconduct may have resulted from his unfamiliarity with the standards of courtroom decorum expected of practitioners before the Board, I find that his continuing failure to comply with instructions by the judge and repeated acts of misconduct after being cautioned by the judge evidenced a willful disregard of those standards.

In his brief, Einy again asserts that as a nonattorney, who was a named party in the underlying proceeding, he was not subject to the standards of ethical and professional conduct imposed by Section 102.77 of the Board's Rules and Regulations. I have already denied Einy's motion to dismiss this proceeding based on this argument because the language in Section 102.177(a), "any attorney or other representative appearing or practicing before the Agency shall conform to the standards of ethical and professional conduct required of practitioners before the courts," (emphasis added) is broad enough to encompass an individual representing himself in a unfair labor practice proceeding and because it is unreasonable to believe that a nonattorney appearing before the Board need not conform to any standards of conduct. Section 102.177(d) states

Misconduct by an attorney or other representative at any stage of any Agency proceeding, including but not limited to misconduct at a hearing, shall be grounds for discipline. Such misconduct of an aggravated character shall be grounds for suspension and/or disbarment from practice before the Agency and/or other sanctions. [Emphasis added.]

The record clearly demonstrates that throughout the underlying proceeding Einy acted as a representative not only of himself but of other named respondents in filing answers and participating in the hearing.

I also find no merit in his argument that Section 102.77(a) is unconstitutionally vague and did not put him on notice of what constitutes misconduct. That section specifically references the standards of ethical and professional conduct required of practitioners before the courts. Throughout the underlying proceeding Einy displayed familiarity with the judicial process and the record shows that he has participated in other matters before the Board.

I find that Einy's misconduct at the hearing in the underlying proceeding violated the following rules of professional conduct applicable to representatives appearing before the Board:

Lawyer's Code of Professional Responsibility, State of New York

DR 1-102 Misconduct

- A. A lawyer shall not:
 - 5. Engage in conduct that is prejudicial to the administration of justice.

DR 7-102 Representing a Client

- A. In the representation of a client, a lawyer shall not:
 - 2. Knowingly advance a claim or defense that is unwarranted under existing law,
 - 3. Knowingly make a false statement of law or fact.

DR 7-106 Trial Conduct

- C. In appearing as a lawyer before a tribunal, a lawyer shall not:
 - 6. Engage in undignified or discourteous conduct which is degrading to a tribunal.

ABA Model Rules of Professional Conduct

Rule 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

Rule 3.3 Candor Toward the Tribunal

- (A) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

- (D) engage in conduct intended to disrupt a tribunal.

As found above, Einy filed answers to the complaints in the underlying proceeding which denied factual allegations he knew to be true and had been established in previous Board proceedings in which he had participated and denied service of documents he had in fact received. During the hearing, he repeatedly engaged in disruptive, unprofessional, and discourteous conduct, including talking loudly at the counsel table and failing to pay attention to the proceedings; interrupting testimony of witnesses; interrupting opposing counsel, the interpreter, and the judge; arguing after the judge had made rulings; failing to follow the judge's instructions; and attempting to communicate with a witness who was testifying.

CONCLUSION OF LAW

By engaging in the conduct described above, Respondent failed to conform to the standards of ethical and professional conduct required of practitioners before the courts and engaged in misconduct of an aggravated character that is grounds for suspension and/or disbarment from practice before the Board as described in Section 102.177(a) and (d) of the Board's Rules and Regulations.

Remedy

I find the Respondent's misconduct in the underlying proceeding to be similar to that of the nonattorney party representative disciplined by the Board in *David M. Kelsey*, 349 NLRB 327 (2007). Accordingly, I shall recommend a similar sanction

of a 6-month suspension, rather than the 2-year suspension requested by the General Counsel.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

In order to preserve and protect orderly administration of the National Labor Relations Act and to effectuate its policy:

Uzi Einy is suspended from appearing or practicing before the Board for a period of 6 months from the date this decision is adopted by the Board.